American Bar Association
www.supremecourtpreview.org

No. 07-1216

In The
Supreme Court of the United States

PHILIP MORRIS USA, INC.,
Petitioner,

v.

MAYOLA WILLIAMS, PERSONAL REPRESENTATIVE OF THE ESTATE OF JESSE D. WILLIAMS, DECEASED,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* SUPPORTING PETITIONER

JAN S. AMUNDSON
QUENTIN RIEGEL
NATIONAL ASSOCIATION
OF MANUFACTURERS
1331 PENNSYLVANIA AVE., N.W.
WASHINGTON, DC 20004

FRANCIS R. ORTIZ
Counsel of Record
ROBERT W. POWELL
DICKINSON WRIGHT PLLC
500 WOODWARD AVENUE
SUITE 4000
DETROIT, MI 48226
(313) 223-3500
fortiz@dickinsonwright.com

Counsel for Amicus Curiae

August 20, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE OREGON SUPREME COURT'S DECISION IS BASED ON AN ERRONEOUS INTERPRETATION OF *WILLIAMS II* THAT THREATENS THE CONSTITUTIONAL PRINCIPLE THIS COURT RECOGNIZED. . . 4

A. Williams II Announced A Broad Constitutional Principle That May Require A Variety of Protections. 4

B. The Oregon Supreme Court's Sole Focus On Jury Instructions Misinterprets, and Improperly Narrows, Williams II. 8

II. THE OREGON SUPREME COURT'S PURPORTED PROCEDURAL RULE IS NOT AN INDEPENDENT AND ADEQUATE GROUND FOR ITS DECISION. 13

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Ake v. Oklahoma, 470 U.S. 68 (1984) 14

BMW of N. Am., Inc. v. Gore,
517 U.S. 559 (1996) 4, 6

Bruton v. United States, 391 U.S. 123 (1968) 7

Buell-Wilson v. Ford Motor Co.,
160 Cal. App. 4th 1107,
73 Cal. Rptr. 3d 277 (2008), *rev. granted/briefing deferred,* 2008 WL 2892940
(Cal. July 9, 2008) 9, 10

Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991) . . . 7

Douglas v. State of Alabama,
380 U.S. 415 (1965) 13, 16

Exxon Shipping Co. v. Baker,
128 S. Ct. 2605 (2008) 6, 7

Flax v. DaimlerChrysler Corp.,
No. M2005-01768-SC-R11-CV
2008 WL 2831225
(Tenn. July 24, 2008) 10

Grefer v. Alpha Technical,
965 So. 2d 511 (La. Ct. App. 2007) 10

Harper v. Virginia Dep't of Taxation,
509 U.S. 86 (1993) 14

James v. Kentucky, 466 U.S. 341 (1984) 16

NAACP v. Alabama ex rel. Flowers,
377 U.S. 288 (1964) 15

Osborne v. Ohio, 495 U.S. 103 (1990) 13

Philip Morris USA v Williams,
127 S. Ct. 1057 (2007) . . . . . *passim*

Smith v. Texas, 127 S. Ct. 1686 (2007) 14

State Farm Mut. Automobile Ins. Co. v. Campbell,
538 U.S. 408 (2003) 4, 5, 9, 11

Staub v. Baxter, 355 U.S. 313 (1958) 16

Sullivan v. Little Hunting Park, Inc.,
396 U.S. 229 (1969) 16

Wilkinson v. Carnival Cruise Lines, Inc.,
920 F.2d 1560 (11th Cir. 1991) 7

Williams v. Philip Morris Inc.,
127 P.3d 1165 (2006) 9, 14, 15

Williams v. Philip Morris, Inc.,
176 P.3d 1255 (2008) 8

INTEREST OF AMICUS CURIAE

The National Association of Manufacturers ("NAM") is the largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 States. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to economic growth and to increase understanding among policymakers, the media, and the public about the vital role of manufacturing in America's economic future.

Because product manufacturers, including the NAM's members, frequently face product liability claims involving mass produced products, they are exceedingly vulnerable to attempts to punish them in an individual lawsuit for all of the harm that a particular product purportedly has caused. Accordingly, the NAM and its members have a tremendous interest in the effective enforcement of this Court's prior decision in this case holding that punishment for allegedly causing harm to nonparties is unconstitutional. Because the Oregon Supreme Court's decision thwarts that ruling in a number of ways, the NAM files this amicus brief supporting the petitioner's request for reversal.[1]

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel, made a monetary contribution to its presentation or submission.

SUMMARY OF ARGUMENT

I. The Oregon Supreme Court's decision denying all relief for a clear violation of this Court's holding in *Philip Morris USA v Williams*, 127 S. Ct. 1057 ("Williams II") is based on the erroneous belief that the protection against unconstitutional punishment required by that decision is limited to a properly requested jury instruction. In fact, this Court recognized a broad constitutional principle in *Williams II* that can be violated in various ways – including the admission or use of improper evidence or argument or improper consideration of nonparty harm in appellate review. Thus, a variety of protections may be required by *Williams II*.

In particular, contrary to the assumption of the Oregon court and a number of other courts applying *Williams II,* this Court did not hold that actual harm to nonparties may be used directly to increase punishment "under the rubric of reprehensibility" as long as a jury instruction is given. This interpretation would render the decision a nullity. The Oregon court's narrow focus on whether a particular jury instruction was requested ignored other violations of *Williams II*.

II. Because its application was based on misinterpretation of *Williams II,* the purported procedural rule invoked by the Oregon Court is not an "independent and adequate" ground for the decision. In addition, the purported rule applied by the Oregon Supreme Court is exactly analogous other discretionary rules of "pointless severity" that have been routinely rejected by this Court as providing

"adequate" state grounds for denying a federal right that plainly was raised. It should be rejected here as well.

ARGUMENT

The Oregon Supreme Court's decision on remand that Philip Morris forfeited its right to protection from unconstitutional punishment, purportedly because it did not request a jury instruction in exactly the right format, has all the earmarks of an evasion of this Court's mandate in *Philip Morris USA v. Williams,* 127 S. Ct. 1057, 1065 *("Williams II").* The purported procedural rule deployed by the court was relied on for the first time after this Court ruled on the merits of the constitutional issue; the rule was applied inconsistently with the Oregon courts' previous willingness to consider Philip Morris' request as a separate instruction; and the rule was applied with pointless severity to deny a claim on which this Court had disagreed with the Oregon court.

Beyond those glaring deficiencies, however, the decision also is based on an erroneous interpretation of *Williams II* as establishing nothing more than a right to a particular jury instruction. This interpretation of *Williams II* threatens to trivialize the decision and rob it of much of its force.

The Oregon Supreme Court, by focusing on the particular format of the jury instruction that Philip Morris requested, ignored the broader constitutional principle in *Williams II* and the indisputable fact that Philip Morris "requested" protection from unconstitutional punishment, that all protection was

denied, and that a violation occurred. Because a state law ground for decision is not "independent and adequate" if based on an erroneous interpretation of federal law, this Court should reject the Oregon Supreme Court's attempt to reduce the important constitutional principle announced in *Williams II* to nothing more than the right to request a jury instruction.

I. THE OREGON SUPREME COURT'S DECISION IS BASED ON AN ERRONEOUS INTERPRETATION OF *WILLIAMS II* THAT THREATENS THE CONSTITUTIONAL PRINCIPLE THIS COURT RECOGNIZED.

A. Williams II Announced A Broad Constitutional Principle That May Require A Variety of Protections.

Over the last decade, in a series of decisions, this Court has established an important principle of constitutional due process: in adjudicating an individual civil wrong, a court may punish the defendant, if at all, only for that individual wrong. In *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), the Court held that punishment in an individual civil case must bear a "reasonable relationship to the harm suffered by the individual plaintiff." In *State Farm Mut. Automobile Ins. Co. v. Campbell,* 538 U.S. 408 (2003), the Court held that a defendant may be punished only for the conduct that harmed the plaintiff, and not for other wrongful or unsavory conduct directed toward others. Significantly, in *State Farm*, this Court expressly held that, "[d]ue process does not permit courts, in the calculation of punitive

damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." 538 U.S. at 423. This principle is violated, the Court held, when a court punishes on the basis that "[t]he harm is minor to the individual but massive in the aggregate." *Id.*

These decisions culminated, and found full expression, in this Court's prior decision in this case, in which it unequivocally held that due process does not allow courts to impose civil punishment for allegedly causing harm to persons who are not parties to the litigation. *Williams II,* 127 S. Ct. at 1065 ("We did not previously hold explicitly that a jury may not punish for harm caused others. But we do so hold now.") This holding, like that in *State Farm,* was based in significant part on the fundamental unfairness of allowing a court or jury, in imposing punishment, to assume that the defendant actually has injured other persons whose claims, if any, have not been adjudicated in the action. *Id.* at 1063. ("[T]he Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.' . . . Yet a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge. . . .")

This is an extremely important principle of procedural due process that strikes at the heart of the unfairness and arbitrariness that has arisen in the administration of punitive damages law. As applied by some courts, this law has allowed a single jury to impose punishment as if its assessment of an individual case applies to the actual or potential claim

of every individual injured by the same, similar, or even dissimilar conduct of the defendant – even when other juries hearing actual cases have exonerated the defendant for that very conduct. *See, Gore,* 517 U.S. at 565, n. 8 (noting that another jury hearing a similar case had imposed no punishment).

The mistaken notion that global punishment is permissible in an individual case may be the greatest single source of the arbitrarily large punitive damages awards that drew this Court's constitutional attention in the first place. *See, Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2625 (2008) ("The real problem, it seems, is the stark unpredictability of punitive awards . . . the outlier cases subject defendants to punitive damages that dwarf the corresponding compensation."). Effective and good faith enforcement of the constitutional principle recognized in *Williams II,* therefore, is integral to eliminating arbitrary civil punishment.

Regarding that enforcement, this Court held broadly that courts may not adopt procedures that create "an unreasonable and unnecessary risk" of unconstitutional punishment, and that, "upon request," courts "must protect against that risk." *Id.* at 1065. While recognizing that States have "some flexibility" in how to prevent unconstitutional punishment, this Court did not hold or suggest that adequate protection always, or necessarily, is limited to giving a jury instruction.

This Court recently recognized the ineffectiveness of jury instructions in preventing arbitrary punishment, *Baker*, 128 S. Ct. at 2628 ("Instructions

can go just so far in promoting systemic consistency when awards are not tied to specifically proven items of damage . . .”). Many courts also have recognized that jury instructions may be inadequate protection against highly prejudicial evidence or argument. *Bruton v. United States,* 391 U.S. 123, 135 (1968) (“[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.”); *Derden v. McNeel*, 938 F.2d 605, 617 (5th Cir. 1991) (“The judge did instruct the jury to disregard the testimony. By that time, however, the skunk was already in the jury box and the stench could not be removed.”); *Wilkinson v. Carnival Cruise Lines, Inc.*, 920 F.2d 1560, 1569, fn. 18 (11th Cir. 1991). Effective enforcement of the due process principle recognized in *Williams II,* therefore, may require significant limits on the admission and use of alleged nonparty harm in cases seeking punitive damages, beyond simply giving a jury instruction prohibiting improper punishment.

From a procedural perspective, this means that the constitutional principle recognized in *Williams II* may be raised in a variety of ways, including objections to the admission and use of evidence or argument because they create an “unreasonable and unnecessary” risk of unconstitutional punishment, objections to reliance on nonparty harm in post judgment review, or even a request for an imperfect jury instruction that is nevertheless sufficient to bring the constitutional violation to the attention of the court. Moreover, if a court rejects the specific protection requested by the defendant, but a

significant risk of improper punishment nevertheless exists, then some other adequate protection must be provided. 127 S. Ct. 1065 ("[A] court, upon request, must protect against the risk . . . federal constitutional law obligates them to provide *some* form of protection in appropriate cases.") (emphasis in original).

B. The Oregon Supreme Court's Sole Focus On Jury Instructions Misinterprets, and Improperly Narrows, Williams II.

The Oregon Supreme Court held that Philip Morris' request for protection from unconstitutional punishment, in anticipation of this Court's holding in *Williams II*, was forfeited because a jury instruction Philip Morris submitted was not "correct in all respects." It then held that, the requested instruction having been properly denied, no other instruction, review, protection, or remedy was required by the Constitution or *Williams II* because all other aspects of its prior decision "lie outside the scope of the Supreme Court's remand." *Williams v. Philip Morris, Inc.,* 176 P.3d 1255, 1263-64 (2008). The court took this position despite the fact that, in upholding the massive punitive damages judgment in its prior decision, it improperly had "adjudicated" the hypothetical claims of nonparties and approved punishment for their assumed aggregate harm:

> Philip Morris's fraudulent scheme would have kept many Oregonians smoking past the point when they would otherwise have quit. Some of those smokers would eventually become ill, some would die, Philip Morris's deceit thus would, naturally and inevitably, lead to

> significant injury or death. . . . Every smoker tricked by its scheme, even those who never got ill, kept buying cigarettes – taking money out of their pockets and putting it into the hands of Philip Morris and other tobacco companies.

Williams v. Philip Morris Inc., 127 P.3d 1165, 1177 (2006). Of course, there had been no evidence, and certainly no finding by the jury, that a single person other than Mr. Williams ever had been "tricked" by Philip Morris into believing that smoking was safe or had continued smoking for that reason. The assumption that Philip Morris' conduct actually had caused injury to many other persons, and the approval of punishment for their hypothetical aggregate harm, is exactly the constitutional violation that this Court first suggested in *State Farm*, and expressly identified in *Williams II*.

Thus, the Oregon Supreme Court itself indisputably violated the constitutional mandate of *Williams II,* but held that no remedy was required because Philip Morris' requested instruction had been properly denied by the trial court. This interpretation of *Williams II* misperceives the nature and scope of the constitutional principle announced, and the courts' obligation to enforce that principle and protect parties from its violation.

The Oregon Supreme Court is not alone in its myopic focus on a jury instruction as the sole constitutional protection required by *Williams II*. A number of other courts have interpreted *Williams II* as establishing a right to a jury instruction, if requested, and nothing more. *See, Buell-Wilson v. Ford Motor*

Co., 160 Cal. App. 4th 1107, 1172, 73 Cal. Rptr. 3d 277, 330 (2008), *rev. granted/briefing deferred,* 2008 WL 2892940 (Cal. July 9, 2008); *Grefer v. Alpha Technical,* 965 So. 2d 511, 577-78 (La. Ct. App. 2007) (denying new trial because no nonparty harm instruction was requested, even though the defendant objected to the *admission* of voluminous evidence of harm allegedly caused to nonparties that the court recognized was "irrelevant and, more than likely, confused the jury, contributing to its exorbitant punitive damage award."); *Flax v. DaimlerChrysler Corp.*, No. M2005-01768-SC-R11-CV, 2008 WL 2831225 (Tenn. July 24, 2008) (denying new trial based on improper punishment for nonparty harm, because defendant did not appeal denial of jury instruction, even though it did appeal *admission* of evidence of nonparty harm that court found was improperly admitted).

This narrow limitation of *Williams II* to a jury instruction reflects a fundamental misunderstanding of this Court's distinction between considering nonparty harm on the issue of reprehensibility and punishment for that harm. In *Williams II*, this Court twice described the potential relevance of evidence of harm to nonparties to the issue of punitive damages. Both times, the Court said that harm to nonparties might help the jury determine whether the conduct that harmed the plaintiff *risked* injury only to the plaintiff or to many persons or the general public. 127 S. Ct. at 1064 ("Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible . . . "); 127 S. Ct. at 1065 ("[W]e recognize that conduct

that risks harm to many is likely more reprehensible than conduct that risks harm to only a few . . . [a]nd a jury . . . may take this fact into account in determining reprehensibility.") It was this assessment of the scope of the risk that the Court found relevant to reprehensibility – not the alleged, but unproven, harm itself.[2]

State Farm held that courts may not adjudicate the hypothetical claims of nonparties "under the rubric of reprehensibility" or punish for aggregate harm, rather than the harm to the plaintiff. 538 U.S. at 423. *Williams II* affirmed this basic due process principle. 127 S. Ct. at 1063 ("[A] defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge . . . How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims.")

Thus, adjudicating the hypothetical claims of nonparties, and their assumed "aggregate harm", violates due process in assessing reprehensibility, just as in "calculating punitive amount." Indeed, because reprehensibility is the primary factor in calculating punitive amount, directly adding alleged harm to nonparties to reprehensibility, and increasing punishment accordingly, would be the precise manner

---

[2] The Court did later refer to "taking account of harm caused others under the rubric of reprehensibility" 127 S. Ct. at 1065, but the Court already had explained what it meant by that in the passages quoted above.

in which a court or jury would punish "directly" for harm to nonparties. If *Williams II* allowed that, then the accusation of the dissenters that the Court's distinction was meaningless would be valid. 127 S. Ct. at 1067 ("When a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant – directly – for third-party harm.") (Stevens, J., dissenting.)

Properly understood, however, the distinction between permissible use of evidence of harm to nonparties to show risk, and impermissible use of unproven harm to increase punishment, is critical to effective enforcement of the basic due process principle announced in *Williams II*. In many cases seeking punitive damages, the fact that the defendant's conduct, if wrongful, created risk to many persons or the general public, rather than just the plaintiff, will be apparent from the conduct itself – e.g., the design of a mass produced product found to be defective, or the illegal discharge of dangerous pollutants into the atmosphere or ground water. In such cases, where the nature of the risk, and its proper relevance to reprehensibility, is apparent from the conduct itself, the invocation of alleged harm to nonparties may serve no proper purpose, and, instead, create an "unreasonable and unnecessary" risk of unconstitutional punishment, regardless of what jury instructions are given.

In this case, the Oregon Supreme Court's express reliance on unproven aggregate harm to nonparties in upholding the punitive damages award created "an unreasonable and unnecessary risk" of unconstitu-

tional punishment – indeed, it made it certain. The idea that correction of the Oregon Supreme Court's own constitutional error, regardless of the instructions requested or given below, "lies outside the scope" of *Williams II's* directive cannot be squared with either the constitutional principle involved, or that decision's express holding.

II. THE OREGON SUPREME COURT'S PURPORTED PROCEDURAL RULE IS NOT AN INDEPENDENT AND ADEQUATE GROUND FOR ITS DECISION.

The erroneous interpretation of *Williams II* by the Oregon Supreme Court is apparent in its holding that Philip Morris forfeited all remedies for unconstitutional punishment because its proposed jury instruction was not "correct in all respects." Regardless of whether the requested instruction was correct in all respects, the request itself was sufficient to bring the constitutional issue to the attention of the court and invoke the general principle long recognized by this Court:

> In determining the sufficiency of objections we have applied the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review.

Douglas v. State of Alabama, 380 U.S. 415, 422 (1965); *accord, Osborne v. Ohio*, 495 U.S. 103, 124-25 (1990)

(when the constitutional violation was raised by a motion to dismiss, the failure to request a protective instruction did not waive the federal right).

Indeed, in its prior opinion upholding the punitive damages award, the Oregon Supreme Court had the constitutional principle firmly in mind in ruling on the propriety of Philip Morris' requested instruction, rejected that principle, and then violated it by using hypothetical harm to nonparties to justify punishment that dwarfed the compensatory damages. 127 P.3d at 1175-77. That court's holding that any remedy for this violation was waived by the failure to request a "correct in all respects" jury instruction improperly narrows, and diminishes, the constitutional principle announced in *Williams II*.

A state law ground that rests on a misinterpretation of federal law is not an independent and adequate state ground for decision. *Smith v. Texas*, 127 S. Ct. 1686, 1690 (2007) ("The requirement that Smith show egregious harm was predicated, we hold, on a misunderstanding of the federal right Smith asserts; and we therefore reverse."); *Ake v. Oklahoma*, 470 U.S. 68, 75 (1984) ("[W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state law prong of the court's holding is not independent of federal law . . . "); *see also, Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993) (state court's holding that no tax refund was required by state law was not "independent and adequate" where it was based on erroneous conclusion that federal decision was not retroactive).

The Oregon court's own violation of *Williams II* by approving a huge punitive damages award based on the supposed aggregate harm to nonparties, 127 P.3d at 1177, was entirely independent of the jury instructions requested or given in the trial court. That appellate error could not be cured by a jury instruction and, therefore, could not be waived by a purported failure to request a jury instruction.

Moreover, the Oregon Supreme Court's application of the "correct in all respects" rule serves no legitimate state interest. As applied here, it amounts to a rule that a proposed jury instruction correctly addressing a distinct topic – that is, one that normally would be given – will be denied if it is printed on the same piece of paper as an instruction addressing a different topic that is incorrect in some way. This rule smacks of similar discretionary rules of "pointless severity" that have been trotted out to deny a newly recognized federal right, which this Court regularly has found inadequate to deny relief.

Indeed, the Oregon court's rule bears a striking similarity to the purported rule applied by the state court in *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964). There the Alabama Supreme Court refused to consider valid federal claims because they allegedly had been argued "together" with other invalid claims. This Court had no problem seeing through this purported ground for decision: "The Alabama courts have not heretofore applied their rules respecting the preparation of briefs with the pointless severity shown here." 377 U.S. at 297. The pointless severity of the Oregon Supreme Court's procedural rule, applied only after this Court recognized the

constitutional right it had rejected, deserves the same fate.

This Court has consistently refused to find such purported procedural rules adequate to deny federal rights that have been clearly raised. *See,* e.g., *James v. Kentucky*, 466 U.S. 341 (1984) (defendant's right to constitutionally required jury instruction not barred because he called it an "admonition"); *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229 (1969) (appeal claiming race discrimination not barred for failure to give opposing counsel a "reasonable opportunity" to review transcript when opposing counsel actually reviewed and approved the transcript); *Douglas v. Alabama,* 380 U.S. 415 (1965) (constitutional challenge to admission of confession not barred because defendant, after objecting three times, failed to object to each individual question and answer as confession read to the jury); *Staub v. Baxter*, 355 U.S. 313 (1958) (challenge to the constitutionality of an entire ordinance not barred because plaintiff failed to challenge each section individually).

The result here should be the same. The highly discretionary rule invoked by the Oregon Supreme Court with unprecedented and pointless severity, based on an erroneously narrow view of *Williams II,* is not an adequate ground to deny the important constitutional right that Philip Morris amply and timely raised.

CONCLUSION

The Oregon Supreme Court's decision should be reversed and a new trial granted for the plain constitutional violation that occurred in this case.

Respectfully submitted,

Francis R. Ortiz
Counsel of Record
Robert W. Powell
Dickinson Wright PLLC
500 Woodward Avenue
Suite 4000
Detroit, MI 48226
(313) 223-3500
fortiz@dickinsonwright.com

Jan S. Amundson
Quentin Riegel
National Association of
Manufacturers
1331 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 637-3000

Counsel for Amicus Curiae